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Office of Administrative Law Judges
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Issue date: 08Aug2001

Case No.: 1997-LHC-2495

OWCP No.: 5-88809

In the Matter of

JAMES W. BROWN

Claimant

v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY

Employer

DECISION ON REMAND

This proceeding involves a claim for compensation by the Claimant, James W. Brown, for an injury that allegedly occurred in the course of his employment covered by the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq.* (Hereinafter "the Act").

The claim was referred by the Director, Office of Workers' Compensation Programs to the Office of Administrative Law Judges for a formal hearing in accordance with the Act and the regulations issued thereunder. A formal hearing was held on August 11, 1998, in Newport News, Virginia (TR at 1). A decision and order was issued on November 10, 1999, finding that Employer had failed to establish suitable alternative employment.

By a decision and order dated December 5, 2000, the Benefits Review Board has vacated and remanded this matter for further consideration of whether the positions of security guard and cashier were suitable alternative employment consistent with its decision. On February 21, 2001 an order was issued permitting the parties to submit motions, and requiring submission of briefs and proposed findings on remand. The Claimant had submitted a Supplemental Brief on February 2, 2001 (prior to issuance of the February 21, 2001 order) and declined to submit another brief after the record had been re-opened. The Claimant did submit a Statement of Proposed Findings on March 26, 2001. Employer submitted a Brief on Remand on March 23, 2001.¹

¹ In its brief the Employer also moves for admission of substituted pages k through p of Employer's exhibit 11, which had been submitted post hearing (the record had not been held open) on September 9, 1998 and September 15, 1998. Employer asserts that these pages "confirm that Dr. Kline approves of the positions contained in the Employer's Labor Market Survey which was received in evidence as Employer's Exhibit 11." (ER remand brief at 1). The Claimant has not disputed the fact that Dr. Kline approved the positions, and stated in his supplemental brief "Dr. Kline has approved the jobs listed in Mr. Karmolinski's survey; Dr. Lee did not provide such approval." (Claimant's remand brief at 5). In view of this agreement, the post-hearing evidence is admitted even though good

ISSUES

The issues presented on remand are:

1. Whether the positions of Security Guard at Diversified Industrial Concepts and the Virginia Department of Transportation constitute suitable alternative employment.
2. Whether the cashier positions, including the position of Cashier at Denbigh Toyota, constitute suitable alternative employment.

STIPULATIONS

At the August 11, 1998 hearing, Employer and Claimant, on the record, stipulated:

1. That the parties are subject to the jurisdiction of the Act;
2. An employer/employee relationship existed at all relevant times;
3. The claimant suffered an injury arising out of and in the course of his employment on May 11, 1993;
4. A timely notice of controversion and a timely first report of accident were filed by the employer;
5. The employer has provided medical services in accordance with the Act;
6. The employer has paid compensation voluntarily as set forth in Employer's Exhibit 12; and
7. The claimant's average weekly wage at the time of his injury was \$548.95, which results in a compensation rate of \$365.97 per week.

(Tr. 6, 7, 8).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

It is not disputed that the Claimant has been diagnosed with work-related bilateral carpal tunnel syndrome, which necessitated surgery on both wrists, and that he reached maximum medical improvement on May 12, 1997, and that he cannot return to his usual work as a result of restrictions imposed following surgery. The burden of proof, then, shifts to the employer to establish that suitable

cause for its late submission was not stated by the Employer.

alternate employment is available upon a reasonably diligent search by the claimant. In the decision and order issued on November 10, 1999, I found that the employer did not establish the availability of suitable alternate employment and awarded permanent total disability benefits.

On appeal the Benefits Review Board, has vacated the award of permanent total disability benefits and remanded for further consideration of whether suitable alternative employment has been shown. Further, as I have now admitted into the record the approval by Dr. Samuel Kline (pages k through p of Employer's exhibit 11) of the six positions of security guard and cashier identified by David Karmolinski in his labor market survey, those positions will be reconsidered to determine if suitable alternate employment has been shown.²

Security Guard

The first security guard position identified by Mr. Karmolinski is with Diversified Industrial Concepts and indicates that the job requirements are:

Will be stationed at gates of Naval base (NOB); Will check trucks in and out of gate checking paperwork; No high school education or experience required.
(Ex 11(e)).

The second security guard position identified by Mr. Karmolinski is with the Department of Transportation - Suffolk, Va., and indicates that the job duties are:

Responsible for patrolling the parking lot of the Dept. of Transportation; Will travel in a security vehicle with automatic transmission, air conditioning and heat; Will lift and carry 5 lb. clock and place it in the car; Will travel with the clock to each. Will get out of the car or roll down the window at each station; Will take a key stored at each station and place into the clock and turn the key; Will bring own food. Will take breaks as appropriate; Cannot leave the job site.
(EX 11(f)).

Mr. Karmolinski indicated that he relied in part upon the *Dictionary of Occupational Titles* (DOT) in forming his opinion. In so doing, he identified the Security Guard position as DOT 189.167-034.³ However, DOT 189.167-034 describes the position of "SECURITY OFFICER," which

² Employer's vocational consultant, Mr. Davis Karmolinski, performed a labor market survey on August 3, 1998. He indicated that the positions of Security Guard (DOT 189.167-034) and Cashier (DOT 211.462-014) "have been screened and fall within Mr. Brown's post-injury vocational profile as obtained by his work restrictions as outlined by Dr. Kline." (EX 11 page d).

³ **DOT 189.167-034 SECURITY OFFICER** (any industry).

Plans and establishes security procedures for company engaged in manufacturing products or processing data or material for federal government: Studies federal security regulations and restrictions relative to company operations. Directs activities of personnel in developing company security measures which comply with federal regulations. Consults with local, district, or other federal representatives for interpretation or application of particular regulations applying to company operations. Prepares security manual outlining and establishing measures and

appears to be an entirely different job than either of the positions named in his labor market survey. When the job duties for a DOT 189.167-034 Security Officer are compared to the duties listed on both the Diversified Industrial Concepts and Department of Transportation jobs, the requirements of DOT 189.167-034 do not even resemble these jobs.

There is a position in the DOT entitled “Security Guard”, but the number for that position is DOT 372.667-034.⁴ When the duties of DOT 372.667-034 are examined, I find that they involve many duties which have not been specifically approved by Dr. Kline, such as “apprehends or expels miscreants.”

It is unclear from the labor market survey on which particular DOT description Mr. Karmolinski based his opinion, Security Officer DOT 189-167.034 or Security Guard DOT 372.667-034. It is equally unclear whether this confusion was present when Dr. Kline approved the positions. With no clear information of how Mr. Karmolinski concluded that “Security Guard” would be a suitable position for Claimant or what information was passed to Dr. Kline about the duties of the positions, both Mr. Karmolinski’s and Dr. Kline’s opinions are of little value in determining whether Security Guard is suitable alternative employment for Claimant.

procedures for handling, storing, safekeeping, and destroying classified records and documents, and for granting company personnel or visitors access to classified material or entry into restricted areas. Directs and coordinates activities of personnel in revising or updating security measures due to new or revised regulations. May request deviations from restrictive regulations that interfere with normal operations. May interview and hire applicants to fill security guard vacancies. GOE: 11.05.02 STRENGTH: S GED: R4 M3 L4 SVP: 7 DLU: 82

⁴ **372.667-034 GUARD, SECURITY** (any industry) alternate titles: patrol guard; special police officer; watchguard
Guards industrial or commercial property against fire, theft, vandalism, and illegal entry, performing any combination of following duties: Patrols, periodically, buildings and grounds of industrial plant or commercial establishment, docks, logging camp area, or work site. Examines doors, windows, and gates to determine that they are secure. Warns violators of rule infractions, such as loitering, smoking, or carrying forbidden articles, and apprehends or expels miscreants. Inspects equipment and machinery to ascertain if tampering has occurred. Watches for and reports irregularities, such as fire hazards, leaking water pipes, and security doors left unlocked. Observes departing personnel to guard against theft of company property. Sounds alarm or calls police or fire department by telephone in case of fire or presence of unauthorized persons. Permits authorized persons to enter property. May register at watch stations to record time of inspection trips. May record data, such as property damage, unusual occurrences, and malfunctioning of machinery or equipment, for use of supervisory staff. May perform janitorial duties and set thermostatic controls to maintain specified temperature in buildings or cold storage rooms. May tend furnace or boiler. May be deputized to arrest trespassers. May regulate vehicle and pedestrian traffic at plant entrance to maintain orderly flow. May patrol site with guard dog on leash. May watch for fires and be designated Fire Patroller (logging). May be designated according to shift worked as Day Guard (any industry); area guarded as Dock Guard (any industry); Warehouse Guard (any industry); or property guarded as Powder Guard (construction). May be designated according to establishment guarded as Grounds Guard, Arboretum (any industry); Guard, Museum (museums); Watchguard, Racetrack (amuse. & rec.); or duty station as Coin-Vault Guard (any industry). May be designated Guard, Convoy (any industry) when accompanying or leading truck convoy carrying valuable shipments. May be designated: Armed Guard (r.r. trans.); Camp Guard (any industry); Deck Guard (fishing & hunt.; water trans.); Night Guard (any industry); Park Guard (amuse. & rec.).
GOE: 04.02.02 STRENGTH: L GED: R3 M1 L2 SVP: 3 DLU: 88

The Employer bears the burden of proof to establish suitable alternate employment. In light of the confusion over which of the two positions of “Security Officer DOT 189-167.034” or “Security Guard DOT 372.667-034” were considered by Mr. Karmolinski and Dr. Kline, I accord their opinions little weight in determining the suitability of the security guard positions.

As a result, I find that the Employer has failed to meet its burden to establish suitable alternate employment in regard to the position of security guard.

Cashier

Mr. Karmolinski outlined four cashier positions he felt would be suitable for Claimant. The first of these positions was as a cashier at Piccadilly cafeteria, and includes the job duties of:

Responsible for taking customer receipts and totaling the bill; Responsible for handling cash, giving proper change to customers, and accepting the appropriate bill amount; Must have appropriate customer service skills; All duties performed while at workstation No lifting; No bending.

EX-11(g.)

The second cashier position was at Goodwill Industries and included the job duties of:

Providing customer service at cash register to customers who are purchasing thrift store item; Responsibility for all money transactions to include credit card purchases, ten key calculator and will utilize pens and pencils; Responsible for keeping the showcase around the cash register straightened up and presentable; Will help straighten store when no customers are in need of assistance.

EX-11(h.)

A third cashier position at Denbigh Toyota includes the duties of:

Responsible for using a calculator and computer keyboard to finalize payment charges on credit cards and personal checks; Will access four drawer file cabinet as needed.

EX-11(i.)

The fourth cashier position was at Bon-Air Cleaners in Virginia Beach and included the job duties of:

Write up customer’s tickets, registering the number of articles of clothing being dropped off (# of pants, shirts, dresses); Store incoming clothes in appropriate bin when customers drop them off (no starch, light starch); Require to operate a cash register as customers pay their bills; Retrieve clothing from the rack (shoulder height) and return them to customers.

(EX-11(j.))

Mr. Karmolinski again indicated that he relied in part on the DOT to form his opinion as to the suitability of the position of cashier.⁵ Post-hearing, Employer's evidence of the approval by Dr. Kline of these positions (as further evidence that the positions were suitable) was admitted (*infra*, n. 1.) However, I find that this evidence is not persuasive in establishing that the position of cashier would be suitable for Claimant, given his restrictions against manipulating small objects with his right hand. Dr. Kline's office notes include the statement, "[Claimant] should avoid work requiring competitive manipulation of small items in his right hand." (Ex2(vv).) Dr. Lee agreed with Dr. Kline, stating in his functional capacity evaluation, that Claimant "will not perform well at jobs requiring fine motor skills with his right hand." (Ex 6(c).)

Yet, three of the four cashier position descriptions that Dr. Kline approved, Piccadilly Cafeteria, Bon Air Cleaners, and Goodwill Industries, specifically state that Claimant would be required to operate a cash register and count money. The fourth position, Denbigh Toyota, involves similar functions using a calculator and computer keyboard to finalize payment charges on credit cards and personal checks. And, while it does not specifically state that the Claimant would be required to handle and count money, it also does not preclude such if a customer pays his bill in cash. The DOT, upon which Mr. Karmolinski stated that he based his opinion, states that among other things, a cashier would be required to count cash, make change, and collect payments made in cash and charge. Counting money would require Claimant to manipulate small objects such as bills, change, and credit cards with both his hands. Thus, I find that the approval by both Dr. Kline and Mr. Karmolinski is clearly contrary to the restrictions given to Claimant by Dr. Kline himself.

A claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on which the availability of suitable alternative employment is demonstrated. *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991). As Employer has failed to rebut the prima facie case of total disability by showing suitable alternative employment, claimant is considered totally disabled.

ORDER

Accordingly, it is hereby ordered that:

1. Employer, Newport News Shipbuilding and Dry Dock Company, shall pay to Claimant, James W. Brown, permanent total disability from May 12, 1997 at a compensation rate of \$365.97 per week;
2. Employer shall pay medical benefits for as long as necessary pursuant to § 7 of the Act;
3. The employer shall receive credit for all compensation that has been paid ;

⁵ **211.462-014 CASHIER-CHECKER** (retail trade)

Operates cash register to itemize and total customer's purchases in grocery, department, or other retail store: Reviews price sheets to note price changes and sale items. Records prices and departments, subtotals taxable items, and totals purchases on cash register. Collects cash, check, or charge payment from customer and makes change for cash transactions. Stocks shelves and marks prices on items. Counts money in cash drawer at beginning and end of work shift. May record daily transaction amounts from cash register to balance cash drawer. May weigh items, bag merchandise, issue trading stamps, and redeem food stamps and promotional coupons. May cash checks. May use electronic scanner to record price. May be designated according to items checked as Grocery Checker (retail trade).
GOE: 07.03.01 STRENGTH: L GED: R3 M2 L2 SVP: 3 DLU: 81

4. Claimant's attorney, within 30 days of receipt of this order, shall submit a fully documented fee application, a copy of which shall be sent to opposing counsel, who then shall have ten (10) days to respond with objections thereto.
5. Interest at the rate specified in 28 U.S.C. § 1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits and penalties, computed from the date each payment was originally due to be paid. See *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984).

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RICHARD E. HUDDLESTON
Administrative Law Judge